

KIMBERLY HALSEY
Claimant

Insurance Carrier

Claimant suffered accidental injury on September 16, 1999, when a coworker, Olin Nelson, grabbed claimant, threatening to throw her into a pen full of cattle. Claimant acknowledged the coworker was not intending to injure her and was only joking around. Claimant warned Mr. Nelson, at that time, that she had previously experienced back

problems and was afraid that he would cause additional injury to her back. Mr. Nelson, described as a large man weighing over 350 pounds, lunged his body several times into claimant's in an attempt to break her grip from a metal gate. Claimant testified she immediately felt a pop in her neck with pain going through her shoulder blades and down into her low spine.

The Administrative Law Judge found that claimant had proven accidental injury arising in the course of her employment, but decided that, because of the horseplay involvement, the question of whether it arose out of her employment must be scrutinized more closely.

In denying claimant benefits, the Administrative Law Judge cited Harris, *supra*, which involves an assault by a coworker. Harris states:

If an employee is assaulted by a fellow worker, whether in anger or in play, an injury so sustained does not arise "out of employment" and the injured employee is not entitled to workers compensation benefits unless the employer had reason to anticipate that injury would result if the two employees continued to work together. Syl. ¶ 2.

Claimant acknowledged that she worked with Mr. Nelson on a regular basis and had never been injured by him before. While there was occasional horseplay between them, which she described as Mr. Nelson pushing her occasionally, claimant also acknowledged that she had never advised any of her supervisors of these pushing incidents.

Claimant and a coworker also testified that there was occasional horseplay in the respondent's feedlot, including spraying others with water, knocking hats off, throwing manure and occasionally wrestling. However, the record does not support a finding that respondent had actual knowledge of these horseplay incidents. It was stated that claimant's supervisor, Jake Jacobson, was occasionally in the area when these incidents occurred. However, neither claimant nor claimant's ex-coworker, Evelyn Eyestone, could testify specifically that Mr. Jacobson was aware of this horseplay.

In addition, claimant testified that she had never before seen anyone try to push another person into a pen full of heifers or steers. Claimant considered this to be a dangerous situation, as the heifers or steers could "turn on you" with no warning and cause serious harm to a worker.

Based upon the evidence in this record, the Board cannot find that respondent had actual knowledge of this horseplay. Castleberry v. Siroky Well Service, Inc., WCAB Docket No. 160,014 (March 1994). Therefore, the Appeals Board finds claimant has not proven accidental injury arising out of her employment with respondent on the date alleged.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated December 22, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Thomas G. Munsell, Kansas City, MO
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director